YAP SOW FONG

v.

LAM JOO HING & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S2-23-53-1998]
25 FEBRUARY 2004

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending decision of another suit - Failure to deliver decision despite trial of suit being completed more than three and a half years ago - Whether decision ought to be delivered within a reasonable time - Whether abuse of process to carry on with proceedings*

This was an application by the defendants for a stay of proceedings in the present suit pending the delivery of the decision of the High Court in another suit ('the other suit'). The defendants in the present suit filed an interlocutory application to strike out the statement of claim and to consolidate the present suit with the other suit. However, both parties sought an adjournment of the striking out application pending the determination of the other suit on the ground that the court's determination of the other suit would substantially decide the factual basis of the present suit. The adjournment was allowed and an agreement to stay was recorded by the court on 3 February 1999 ('the agreement'). The trial of the other suit was completed on July 2000; at the conclusion of the trial, the court reserved judgment. However, despite a written request by the plaintiff that a decision be given as soon as possible, to date (more than three and a half years after the completion of the trial of the other suit), the decision had yet to be delivered.

Held:

[1] There would be no injustice caused to the defendants nor any abuse of the process of the court by the plaintiff if this court were to carry on with the proceedings in the present suit. On the facts, although a period of three and a half years (or four years from the date of the agreement) had passed and a reminder sent to the secretary of the learned judge, the pertinent fact was that until today, there was neither a reply to the reminder nor a decision in relation to the other suit. In the circumstances, a grave injustice would be caused to the plaintiff in the present suit if this court were to prevent the plaintiff from proceeding with the present action. The plaintiff had been more than patient and it was ridiculous and grossly unfair to compel her to wait any longer. (p 80 d-e)

[2] The question of repudiation of the agreement by the plaintiff did not arise at all as it was an implicit term in the agreement that the parties agree to the stay of the present suit only on condition that the court in the other suit delivers its decision within a reasonable time. Without doubt, the three and a half years (or four years from the date of the agreement) that have since passed was not a reasonable time, all the more so in the absence of any plausible explanation as to why, until today, no decision had been given. This court was certain that the parties, including the court that recorded the agreement to stay, never contemplated that the stay should be indefinite or for this long. (p 80 f-g)

[Application dismissed.]

Case(s) referred to:
Robertson v. Cilia [1956] 3 All ER 651 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 92 r. 4

For the plaintiff - Alvin Teo; M/s Lee Ong & Kandiah
For the defendants - IN Jeganathan; M/s SK Yeoh & Partners

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:
This summons in chambers (encl. 13) is an application by the defendants that the proceedings of the present suit be stayed pending the delivery of the decision of the High Court judge in another 'suit, namely, Kuala Lumpur High Court civil suit No. D1-24-336-1996 (hereinafter shall be referred to as "the other suit").

The present application is made pursuant to O. 92 r. 4 of the Rules of the High Court 1980. This rule provides:

> **Inherent powers of the Court.**
>
> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The writ and statement of claim in the present suit was filed on 7 August 1998.

The other suit was filed earlier, that is to say, on 24 September 1996. In the other suit, all the defendants in the present suit together with three other persons are the plaintiffs; whilst the plaintiff in the present suit, together with three other persons and a company known as "Lam Kee Ying Sdn Bhd", (hereinafter referred to as 'the company') are named as the defendants.

In the other suit, the plaintiffs in that suit claim that the 1st defendant therein (ie, the plaintiff in the present suit) had wrongfully converted a substantial number of shares in the company. It is alleged that the shares so converted belong to the plaintiffs in the other suit.

Now, the following facts are not in dispute. In the course of the proceedings in the other suit, the plaintiff in the present suit, as one of the defendants in the other suit, filed an affidavit. In the said affidavit, she alleges that the defendants in the present suit (being four of the seven plaintiffs in the other suit) had transferred their shares in the company to her. The defendants in the present suit, after reading this affidavit, made several police reports alleging that the plaintiff in the present suit had fraudulently caused the shares to be transferred to her name.

In the present suit, the plaintiff alleges that she is the director of the company (this is disputed by the defendants) and she claims damages against the defendants for defamation. The plaintiff alleges that the defendants had maliciously made false police reports against her; the false information being the allegation that she had fraudulently caused shares in the company belonging to the defendants to be transferred to her name.

In the present suit, the statement of defence was duly filed by the defendants on 25 September 1998. In the statement of defence, the defendants claim that the contents of their police reports are true in substance and in fact. Alternatively, the defendants plead qualified privilege.

On 5 October 1998, the defendants in the present suit filed *vide* a summons in chambers (encl. 3) an interlocutory application:

(a) to strike out the statement of claim of the present suit pursuant to O. 18 r. 19 of the Rules of the High Court on the grounds that the statement of claim is frivolous and vexatious and/or an abuse of the process of court; or, alternatively,

(b) to consolidate the present suit with the other suit.

Subsequent to the filing of this striking out application (encl. 3), the other suit was fixed for trial on 5 to 9 April 1999.

However, prior to the trial, the defendants' solicitors in the present suit, with the agreement of the plaintiff's solicitors in the present suit, by letter dated 25 January 1999, wrote to the deputy registrar of the court seeking an adjournment of the striking out application pending the determination of the other suit by the court at the conclusion of the scheduled trial in April. The reason given for seeking the adjournment was that a determination of the other suit by the court would substantially decide the factual basis of the present suit. The adjournment was allowed and an agreement to stay was recorded by the court on 3 February 1999.

The trial of the other suit was, however, completed only in July 2000; and at the conclusion of the trial, the court reserved judgment. But after a lapse of more than two years, no decision was delivered. So, on 2 October 2002, the solicitors (Messrs Lee Ong & Kandiah) for the defendants in the other suit (who are solicitors for the plaintiff in the present suit) wrote to the secretary of the learned judge requesting that a decision be given as soon as possible. However, there appears to be no reply to that letter and until today (more than 3 1/2 years after the completion of the trial of the other suit) the decision has yet to be delivered.

In the present suit, the application (encl. 13) for stay of proceedings by the defendants that is now before me was filed on 20 February 2003. What prompted the defendants to file the present application is a letter by the plaintiff's solicitors (Messrs Lee Ong & Kandiah) to the defendants' solicitors (Messrs S.K. Yeoh & Partners) notifying the latter of the plaintiff's intention to proceed with the defendants' striking out application (encl. 3).

The ground given by the defendants for this stay of proceedings application is the "agreement to stay" of 3 February 1999. The defendants submit that this court should await the decision of the court in respect of the other suit before proceeding further in the present suit. It is argued that this is necessary in order to prevent injustice to the defendants, that is to say, to avoid inconsistent decisions on the same factual disputes; or, alternatively, to prevent an abuse of the process of court by the plaintiff, that is to say, to prevent the plaintiff from repudiating the stay agreement.

The plaintiff, in opposing the defendants' application, on the other hand, submits that the proceedings of the present suit should not be stayed indefinitely, citing *Robertson v. Cilia* [1956] 3 All ER 651. She contends that this court has no power to grant an indefinite adjournment.

The principle of law that I can abstract from *Robertson v. Cilia* is that a court in considering whether or not to grant an adjournment is also duty bound to consider whether or not the duration of the adjournment asked for is reasonable or not under the circumstances. In this case cited, on the facts including the financial conditions prevailing in the United Kingdom then, described as the credit squeeze, the court held that an adjournment of one year to enable a mortgagor to pay a mortgage debt was unreasonable. Upjohn J said (at p. 655):

> It cannot, in my judgment, be a reasonable exercise of my discretion to adjourn the hearing for as long as one year in the mere hope that the financial position of the country will ease and that the defendant will be able to find someone able and willing to lend him money to discharge the plaintiff's mortgage.

In my judgment, I fail to see any injustice caused to the defendants, or any abuse of the process of court by the plaintiff being allowed or facilitated by this court, if this court were to proceed with the proceedings in the present suit. As noted above, not only a period of 3 1/2 years (or four years from the date of the agreement to stay – 3 February 1999) has passed but a reminder had also been sent to the secretary of the learned judge. And the pertinent fact is that until today, not only was there no reply to the reminder, but there is also no decision given on the other suit. Under the circumstances, it is my judgment that a grave injustice will, instead, be caused to the plaintiff in the present suit if this court were to prevent the plaintiff from proceeding with the present action. The plaintiff has been more than patient. It is ridiculous and grossly unfair to compel her to wait any longer.

As for the agreement to stay of 3 February 1999, in my judgment, the question of repudiation of that agreement by the plaintiff does not arise at all. I hold that it is an implicit term in the agreement that the parties agree to the stay of the present suit only on condition that the court in the other suit deliver its decision within a reasonable time. In my view, without doubt the 3 1/5 years (or four years from the date of the agreement to stay – 3 February 1999) that have since passed is not a reasonable time; and all the more so in the absence of any plausible explanation as to why, right until today, no decision has been given. I am certain that on 3 February 1999 the parties, including the court that recorded the agreement to stay, never had in mind that the stay should be indefinite or this long.

This application by the defendants is, therefore, dismissed with costs. A date shall now be fixed for the hearing of the defendants' application at encl. 3.